25

No. 495

Office - Supreme Court, U. S.
FILED
DEC 26 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

WEIGERT-DAGEN, WEIGERT-DAGEN SHOE CO.,
J. F. GOLDKAMP & CO.,
Petitioners,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

ALLERTON DE CORMIS TOMPKINS,
Attorney for Petitioners.

December, 1951.

INDEX

PAGE

Petition 1
Opinions Below 1
Jurisdiction 2
Statutes Involved 2
Statement of Fact 2
Questions Presented 3
Specification of Errors to be Urged 7
Reasons for Granting the Writ 10
Conclusion 22
Appendix 23

CITATIONS

Cases:

B. Altman & Co. v. United States, 224 U. S. 583 ..... 12, 16
American Net & Twine Co. v. Worthington, 141 U. S. 468 ... 16
Arthur v. Cumming, 91 U. S. 362 15
Arthur v. Morrison, 96 U. S. 108 16

Berbecker v. Robertson, 152 U. S. 373 ..... 16, 18

Choctaw Nation of Indians v. United States, 318 U. S. 423 ... 16, 19
Curtis v. Martin, 3 How. 105 16
Copeland v. United States, 12 Cust. Ct. 85, C. D. 833 14
Crosse & Blackwell v. United States, 18 Cust. Ct. 123, C. D. 1055, affirmed in Crosse & Blackwell v. United States, 36 C. C. P. A. (Customs) 33, C. A. D. 393 14

Fenton v. United States, 15 Cust. Ct. 200, C. D. 972 14
Foster v. Nielsen, 2 Peters 253 12
Fourteen Diamond Rings v. United States, 183 U. S. 176 12

Jordan v. Tashiro, 278 U. S. 123 ..... 16, 19

Landweer v. United States, 23 Cust. Ct. 171, Ab. 53576 14

Maddock v. Magone, 152 U. S. 368 ..... 16, 17

Newman v. Arthur, 109 U. S. 132 16
Nielsen v. Johnson, 279 U. S. 47 ..... 16, 19

One Hundred and Twelve Casks of Sugar, 8 Peters 277 16

Pickhard v. Merritt, 132 U. S. 252 16

C. H. Powell Co. v. United States, 34 C. C. P. A. (Customs) 29, C. A. D. 340 ..... 11, 12, 14

PAGE

Swan v. Arthur, 103 U. S. 597 16

Two Hundred Chests of Tea, 9 Wheat. 430 16

United States v. American Trucking Association, 310 U. S. 534 12

United States v. Fung Chong Co., 34 C. C. P. A. (Customs) 40, C. A. D. 342 18

United States v. Good Neighbor Imports, Inc., 33 C. C. P. A. (Customs) 91, C. A. D. 321 .....11, 12, 14

25 C. J. S. p. 154, Sec. 18, Note 54 4

Statutes:

Tariff Act of June 17, 1930:
Paragraph 1530(e)-46 Stat. 667 ..... 2, 23
Sec. 350-48 Stat. 943 2

Act of September 8, 1916-39 Stat. 795 4

Trade Agreements between the United States and—
General Agreement on Tariffs and Trade 10, 14
Geneva Convention 10
Annecy Convention 10
Torquay Convention 11

Argentina Pres. Proc. 1685 .....11, 13
Costa Rica " " 1582 .....11, 13
Ecuador " " 1951 .....11, 13
El Salvador " " 1564 .....11, 13
Guatemala " " 3989 .....11, 13
Honduras " " 1075 .....11, 13
Mexico " " 833; 2901 .....2, 13, 23
Paraguay " " 3688 .....11, 13
Switzerland " " 3917 .....11, 13
Venezuela " " 2375 .....11, 13

Department of State Publications:

"Analysis of General Provisions and Reciprocal Concessions" relative to the Mexican Trade Agreement—(Bulletin of 12/26/42 Supp., Vol. VII, No. 183-A, Pub. 1861) 4, 5, 8, 19
Publication 2983, Commercial Policy Series 109 10
Publication 3651, Commercial Policy Series 120 10
Publication 4209, Commercial Policy Series 135 11

PAGE

U. S. Tariff Commission Publications:

"Summaries of Tariff Information"—1948 ..... 5, 6
"Digests of Trade Data" relative to the Mexican Trade Agreement 5, 25

Department of Commerce Publications:

"Quarterly Summary of Foreign Commerce of the United States (Cumulative)", April, 1951 by Bureau of Census 10
"Monthly Summary of Foreign Commerce of the United States", December 1939 by Bureau of Foreign & Domestic Commerce 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

WEIGERT-DAGEN, WEIGERT-DAGEN SHOE CO.,
J. F. GOLDKAMP & CO.,
Petitioners,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Petitioners, Weigert-Dagen, Weigert-Dagen Shoe Co. and J. F. Goldkamp & Co., pray that a writ of certiorari be issued to review the judgment of the United States Court of Customs and Patent Appeals in the case of *The United States* v. *Weigert-Dagen, Weigert-Dagen Shoe Co., J. F. Goldkamp & Co.*, entered November 5, 1951, reversing a judgment of the United States Customs Court rendered September 12, 1950.

Opinions Below

The opinion of the United States Customs Court is reported in 25 Cust. Ct. 105, C. D. 1272 (R. 264-277). The opinion of the United States Court of Customs and Patent Appeals, 39 Ct. Cust. Appls. (Customs)——, C.A.D. 464 (R. 278-290) is reported in the advance weekly Treasury Decisions Vol. 86, No. 41, October 11, 1951, page 37.

Jurisdiction

The original decision of the United States Court of Customs and Patent Appeals was rendered on June 26, 1951. A petition for rehearing was denied on September 28, 1951. A second petition for rehearing was denied November 5, 1951 when final judgment was entered.

The jurisdiction of this Court is invoked under 28 U.S.C. (1946 ed., Supp. 4) § 1256.

Statutes Involved

Paragraph 1530(e), Tariff Act of 1930 (46 Stat. 667; 19 U.S.C. Sec. 1001) (set forth in the Appendix, infra) as modified by the "Trade Agreement between the United States of America and the United Mexican States", signed December 23, 1942 and proclaimed by the President on December 31, 1942 (57 Stat. 833, 892), the pertinent portion of which is set forth in the Appendix, infra, as negotiated under the authority of the "Trade Agreements Act" of June 12, 1934, Sec. 350, Tariff Act of 1930 (48 Stat. 943; 19 U.S.C. Sec. 1351) as extended by the joint resolutions of Congress of March 1, 1937 and April 12, 1940.

Statement of Fact

The collectors of customs at Laredo, Texas, and St. Louis, Missouri, on instructions from the Commissioner of Customs, declined to classify certain imported Mexican footwear under the provisions of the Mexican Trade Agreement which lowered the duty from 20% to 10% ad valorem on imported huaraches and slippers for housewear.

The trial court, the United States Customs Court, reversed the action of the collectors (1) as to certain items of footwear which the court found were "huaraches" within the common and commercial meanings of that term,

and (2) as to certain other items which were found to be slippers for housewear.

On appeal, the court below, the United States Court of Customs & Patent Appeals, reversed the action of the trial court one judge dissenting. In so doing the court below held that where trade witnesses were not in complete agreement about the meaning to be given to a new ambiguous term—*i.e.* "huaraches"—in a trade agreement between the United States and a foreign sovereign state, a description of this word contained in "Digests of Trade Data" published by the United States Tariff Commission five months after the agreement was made could be adopted by the court as establishing the meaning to be given to this word because such a definition indicated the intentions of the trade agreement negotiators. This conclusion was not altered by the fact that this "Digests" description was "drawn from" detailed confidential data made available to the U. S. Trade Agreements Committee only, and was not shown by the evidence before the court, or otherwise, to be acceptable to the Mexican negotiators of the agreement, to the trade of either country, or to the U. S. Bureau of Customs. Nor was it altered by the fact that this "Digests" description (1) was different from the descriptions and practical constructions given to this word by the U. S. Department of State on the date when the agreement was signed, and (2) was subsequently revised by the Tariff Commission itself.

Two petitions for rehearing requesting the court below to reconsider its decision were denied.

Questions Presented

(1)

In ascertaining the meaning of doubtful and ambiguous words in a reciprocal trade agreement between the United States and Mexico, should "Digests of Trade Data" be considered to evidence the common or joint intent of both

Mexican and United States negotiators, where it appears that the "Digests" are a publication made and issued by the U. S. Tariff Commission after the effective date of the trade agreement[1], and shown by a foreword (set forth in Appendix, infra) of said "Digests" to contain material which has been "drawn from" data made available to the American negotiators only—*i.e.*, the U. S. Trade Agreements Committee; and not shown by the "Digests" or by the proof and record of this case to have been furnished and made available to the Mexican negotiators prior to or during the negotiations leading to the execution of the trade agreement?

(2)

In ascertaining the meaning of a doubtful and ambiguous word (such as "huaraches") in a reciprocal trade agreement treaty[2] (such as between the United States and Mexico), should a description of this word (see Appendix, infra) published in "Digests of Trade Data" by the United States Tariff Commission[3] five months after the treaty is executed[4] be given preference over the descriptive material[4]

---

[1]—The Trade Agreement with Mexico was signed on December 23, 1942, and the "Digests of Trade Data" were published May 17, 1943—(R. 306-307).

[2]—A reciprocal commercial agreement is a treaty although not of the kind requiring ratification by the Senate—B. Altman & Co. v. United States, 224 U.S. 583, 25 C.J.S. p. 154 Sec. 18, note. 54.

[3]—The United States Tariff Commission was created by Congress on September 8, 1916 (39 Stat. 795) to supply Congress and the President with information about the position of U. S. industries in competition with imports, the operation of the U. S. customs laws, and the commercial policies of foreign countries. See also 42 Stat. 858, 46 Stat. 696, 48 Stat. 943, 62 Stat. 1248. Executive Order 10082 of 10/5/49.

[4]—In the "Analysis of General Provisions and Reciprocal Concessions" relative to the Trade Agreement with Mexico as published by the U. S. Department of State on December 23, 1942, the date when the Mexican Trade Agreement was signed, the term "huaraches" is defined as "woven-leather sandals"—Department of State Bulletin December 26, 1942 Supplement, Vol. VII, No. 183-A—Publication 1861, page 1051.

and practical constructions[5] given to this word on the day the agreement is signed by the United States Department of State which conducted the treaty negotiations on behalf of the United States government, and where it further appears that the description of the word in the "Digests" is subsequently revised, altered and corrected by the U. S. Tariff Commission itself[6]?

(3)

In ascertaining the meaning of doubtful and ambiguous words in reciprocal trade agreements between the United States and foreign countries designed and intended on their face "for the promotion of trade" or for "expanding the production and exchange of goods" (Preamble, each trade agreement), where all diplomatic correspondence and negotiations relating to such agreements are confidential and not available for public examination, and, as a result, the actual intentions of the negotiators for the respective countries cannot be readily ascertained, should such words be given a limited meaning not shown to be accepted commonly or by commercial men in either country who trade in the commodity related to such words, so as to embrace only those particular designs and styles of imported articles that were handled commercially prior to the execution of a trade agreement, and thus restrict the application of the trade agreement provisions in such a way as to stabilize and confine the flow of international trade only to pre-

---

[5]—On page 1033 of said "Analysis" by the Department of State, Publication 1861 (footnote [4], supra) it is stated:

"Huaraches make up practically all imports of women's, misses' and children's shoes coming from Mexico".

[6]—In the "Summaries of Tariff Information — 1948" Vol. 15, Part 6, pages 115-116, the U. S. Tariff Commission redefined the term "huaraches" and omitted all reference to the qualifying language (as originally used in 1943 in the "Digests of Trade Data") stating that "the heel is nailed on". Many of the items in suit do not have nailed-on heels.

existing designs and styles[7], or should such words be given a liberal meaning in accord with the practical constructions indicated by the U. S. Department of State and generally accepted commonly and in the trade in each negotiating country by commercial men who deal in the commodity related to such words, which liberal meaning embraces old and new designs and styles of the commodity, and thus tend to stimulate and expand the flow of international trade covered by the provisions of trade agreements?

(4)

Should a reciprocal trade agreement, a compact between two independent nations be construed and interpreted as though it were a unilateral legislative act of the Congress of the United States, in respect to which legislative act it is proper for the court to resort to Congressional debates and hearings as extraneous aids "under the established rules of evidence" in order to determine the meaning of doubtful and ambiguous words?

(5)

Is it an abuse of judicial discretion warranting the exercise of the supervisory powers of this Court for an appellate court to decline timely requests (1) to correct unproven assumptions not of common knowledge that are used by the appellate court as the basis for reversing a trial court, and (2) to reconsider reversal action taken on merchandise that was not before the appellate court for review[8] and permit appellee, who pleads surprise, to argue

---

[7]—Imports of footwear from Mexico, mostly huaraches, have declined from a high of 4,700,000 pairs in 1943 when the Mexican trade agreement became effective to only 276,000 pairs in 1947—1948 "Summary of Tariff Information" by U. S. Tariff Commission, page 116.

[8]—The lower court reversed the trial court as to merchandise represented by Exhibits 1, 40, 41, 42 and 43, which items were not covered by appellant's Assignments of Error (R. 2).

on matters voluntarily considered by the court without notice to appellee that the court would voluntarily entertain jurisdiction[9], where it appears that it is the practice of the appellate court, as evidenced by a uniform practice over a period of the last five years, to deny all petitions for rehearing in customs cases[10]?

Specification of Errors to be Urged

The Court below erred

(1) In finding and holding that definitions contained in "Digests of Trade Data" made and issued by the United States Tariff Commission in connection with a previously signed reciprocal trade agreement between the United States and a foreign sovereign state (specif. between the United States and Mexico) should be considered to evidence the common or joint intent of the negotiators of both High Contracting Parties.

(2) In finding and holding that the "Digests of Trade Data", a publication prepared by an independent agency of the federal government not charged by law with the right, duty, or responsibility of interpreting or of executing trade agreements with foreign governments, contains therein the meanings to be given to doubtful and ambiguous words used in reciprocal trade agreements between the United States and a foreign sovereign state (specif. between the United States and Mexico).

(3) In not relying upon information published by the United States Department of State on the day when the

---

[9]—Petition for Rehearing (R. 319).

[10]—During the course of the last five years the appellate customs court has declined every petition for rehearing in a customs case. Not one petition has been granted; nineteen have been denied (Customs Appeals 4513, 4530, 4524, 4550, 4569, 4578, 4590, 4588, 4603, 4617, 4621, 4622, 4627, 4643, 4636, 4655, 4653, 4664 (twice). See Appendix, infra, for titles).

trade agreement with Mexico was signed (Specif. Department of State Bulletin, Vol. VII, No. 183-A, Publication 1861, December 26, 1942 Supplement) when interpreting doubtful and ambiguous words contained in this agreement.

(4) In construing and interpreting a trade agreement, a compact between two independent nations, as though it were a unilateral legislative act of the Congress with one side only to be considered—*i.e.*, the United States side; in giving effect only to the implied intentions of the American side of the negotiation; in deciding and holding in effect that the intent of the Mexican negotiators should be disregarded and ignored, or in assuming that the intent of the Mexican negotiators was the same as, or identical with, the intent of the American negotiators whose intent was found by the court below without supporting facts or evidence to be contained in a publication made and issued by the U. S. Tariff Commission; that, in effect, the intent of the Mexican negotiators should be found in matters to which they were not privy.

(5) In finding and holding in effect that the information contained in the "Digests of Trade Data" as published by the U. S. Tariff Commission was furnished to the negotiators of the trade agreement between the United States and Mexico—*i.e.*, the Mexican as well as the U. S. negotiators; in finding and holding in effect that the U. S. Tariff Commission defined and described leather huaraches to both teams of the negotiators of the trade agreement—*i.e.*, the Mexican as well as the U. S. negotiators.

(6) In finding and holding that neither the common meaning nor the commercial meaning to be given to the term "huaraches" was definitely established at the trial.

(7) In disregarding the evidence produced by qualified commercial witnesses at the trial about the meaning given

to the term "huaraches"; in not affirming and approving the condensed and codified common and commercial meaning given to this term as found by the trial court (R. 271); and in disregarding the evidence produced by each of the qualified commercial witnesses at the trial as to whether each exhibit in suit, each representing a distinct design or style of the imported footwear under protest, was or was not a "huarache".

(8) In refusing to correct, after timely requests to do so, the unsupported assumption that both parties to the Reciprocal Trade Agreement between the United States and Mexico were, during and prior to the Trade Agreement negotiations, aware of the definitions as contained in said subsequently issued "Digests of Trade Data".

(9) In reversing the judgment of the trial court on matters that were not before the court below for review—Specif. as to merchandise represented by Exhibits 1, 40, 41, 42 and 43.

(10) In finding and holding that the United States Customs Court erred in granting the motions to amend protests 120694-K, 120695-K, 122689-K and 126181-K.

(11) In reversing the judgment of the trial court as to the merchandise represented by exhibits 2 through 15, 17 through 20, 22, 23, 25, 27, 28, 30, 32 through 34, 36 through 39.

(12) In denying the original Petition for Rehearing as filed July 19, 1951.

(13) In denying the Second Petition for Rehearing as filed October 19, 1951.

(14) In reversing the judgment of the trial court.

(15) In not remanding the case to the trial court for further evidence (1) to establish whether or not the merchandise represented by exhibits 1, 40, 41, 42 and 43 was

covered by the protests as originally filed, and on which the court below assumed jurisdiction, or (2) to establish which, if any, of the items of merchandise under protest conformed to a new definition criterion approved by the court below but not connected at the trial with any of said merchandise.

Reasons for Granting the Writ

(1) The application and interpretation of new tariff classification language used in trade agreements is now of primary importance in determining the tariff status of most merchandise imported into the United States. Most of the statutory duty provisions have been modified by trade agreements since the enactment of the Trade Agreements Act in 1934. A volume of import trade valued at $1,766,500,000.00 per annum based on 1939 figures (which should be quadrupled to about $7,000,000,000.00 to reflect the present volume of trade[11]) was affected by the duty modifications obtained in 1947 under the Geneva Convention of the "General Agreements on Tariff and Trade"[12]. An additional volume of imported dutiable merchandise (not duty free) valued at $143,064,000.00 per annum based on 1948 figures was affected by the duty modifications obtained in 1949 at the Annecy Convention of G.A.T.T.[13]; and during this past year an additional volume of import trade valued at $478,000,000.00 per annum based on 1949

---

[11]—Total imports in 1939 were valued at $2,318.2 million. Total imports in 1950 were valued at $8,734.5 million—"Monthly Summary of the Foreign Commerce of the United States", December, 1939, by Bureau of Foreign & Domestic Commerce, Department of Commerce, and Table 1, "Quarterly Summary of Foreign Commerce of the United States (Cumulative)" April 1951, by Bureau of the Census, Department of Commerce.

[12]—Department of State Publication 2983, Commercial Policy Series 109, page 133.

[13]—Department of State Publication 3651, Commercial Policy Series 120, page 138.

figures was affected by the duty modifications obtained at the recent Torquay Convention of G.A.T.T.[14]—Thus the recent trade agreement negotiations alone, irrespective of the volume of trade affected by previously signed trade agreements with individual countries, such as Mexico[15], have effected a volume of current trade valued at many billions of dollars.

(2) A large portion of the trade agreement tariff modifications contain specific items—*i.e.* "huraches"—not found in the original Congressional language of the statutory tariff act. Importers have long contended that this new language should be interpreted in accordance with commonly understood and trade accepted definitions, but the United States Court of Customs and Patent Appeals has not accepted this criterion. The court below takes the position that new ambiguous language contained in bilateral agreements between two or more sovereign states is to be interpreted in accordance with a peculiar extension of the rules applicable to unilateral legislation—*United States* v. *Good Neighbor Imports, Inc.*, 33 C.C.P.A. (Customs) 91, C.A.D. 321; *C. H. Powell Co., et al.* v. *United States*, 34 C.C.P.A. (Customs) 29, C.A.D. 340.

The lower court in the decision below has interpreted a commercial agreement as though it were a unilateral legislative Act of Congress and has applied the ordinary rules of legislative construction in interpreting a two party compact between sovereign nations. This holding and decision is in direct conflict with the settled principles of treaty[2] construction contained in decisions of this Court beginning at the very earliest times, wherein this court has held that a treaty is in the nature of a contract

---

[14]—Department of State Publication 4209, Commercial Policy Series 135, page 288.

[15]—Individual bilateral trade agreements are now in effect with the following countries: Argentina, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Paraguay, Switzerland and Venezuela.

between two nations and not legislative acts. *Foster* v. *Nielsen,* 2 Peters 253, 314; *B. Altman & Co.* v. *United States,* 224 U. S. 583; *Fourteen Diamond Rings* v. *United States,* 183 U. S. 176, 182-184. The court below considered the "Digests" made and issued by the U. S. Tariff Commission after the execution and promulgation of the trade treaty or agreement with Mexico to be the history of the trade agreement and dealt with it as though it was the minutes of the proceedings of both sets of negotiators, Mexican as well as those of the United States, and therefore to be considered evidence of the common or joint intent of both of the High Contracting Parties and determinative of any doubtful or ambiguous language or words in the treaty.

The practice of the court below in relying upon "Digests of Trade Data" as indicative of the intention of both parties to the trade agreement negotiations stems from the *Good Neighbor Imports* decision (*supra*), in which case the importer filed no appearance and *made no argument on appeal.* The court in that case, relying upon the rule of interpretation applicable to unilateral Congressional acts for determining the intention of legislators when ambiguous words are used, as outlined in *United States* v. *American Trucking Association,* 310 U. S. 534, 542, assumed to apply the same rule to *bilateral* agreements without regard to the intentions of the second party to the agreement.

Thereafter the appellate customs court took a firm position about the status of these "Digests of Trade Data" and held in the case of *C. H. Powell Co., et al.* (*supra*):

> "That information obtained from the 'Digests of Trade Data', supra, is proper to be considered where there is ambiguity in the language used in the Reciprocal Trade Agreement *cannot be questioned.*" (Italics added.)
>
> 34 C.C.P.A. (Customs), page 32.

Your petitioners feel that an extension of the rules for interpreting legislative intention which are applicable in cases involving Congressional unilateral legislation *should be questioned* when such rules are applied to bilateral trade agreements which govern the international trade between this country and foreign nations, where the court can neither be supplied with evidence about the intentions of the negotiators of the foreign government, nor be supplied with accurate data furnished to the U. S. negotiators.

Your petitioners know of no decision, and can find no legal authority, to support the position that evidence which tends to show the intention of one party to a bilateral agreement *ipso facto* represents the intention of both parties. The application of such a peculiar legal maxim to reciprocal trade agreements, which are now the primary basis for the assessment of duties upon goods imported into the United States, the life-blood of our foreign trade, seems to warrant the attention of this Court.

(3) While it is true that the trade agreement with Mexico, here involved, was cancelled by mutual agreement on September 6, 1950 (Presidential Proclamation #2901), after this case was tried, the same identical principles of law are raised in each and every case involving the interpretation of new ambiguous words used by trade agreement negotiators in making duty modifications designed to control or stimulate international commerce. Whether the customs courts are interpreting language used in bilateral trade agreements with such countries as Mexico, Argentina, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Paraguay, Switzerland, Union of South Africa or Venezuela[16] and resort to the definitions contained in pertinent

---

[16]—These currently active bilateral trade agreements were put into effect by the following Presidential Proclamations: Argentina #1685, Costa Rica #1582, Ecuador #1951, El Salvador #1564, Guatemala #3989, Honduras #1075, Paraguay #3688, Switzerland #3917, and Venezuela #2375.

"Digests of Trade Data" prepared after each agreement by the U. S. Tariff Commission, or whether the customs courts are resorting to definitions contained in the similar 1948 "Summaries of Tariff Information" prepared by the same Tariff Commission in connection with the multilateral "General Agreement on Tariffs and Trade"[17], the same identical legal principles as raised in this case, are likewise raised in every other case involving the interpretation of ambiguous trade agreement language. The tendency to adopt these peculiar legal principles[18] will now become affixed for customs law purposes by reason of the decision of the court below in this case reaffirming their position as adopted in the cases of *Good Neighbor Imports, Inc., supra,* and *C. H. Powell Co., supra,* unless this Court is willing to act upon the matter.

Clearly, the questions presented here are of great importance to the administration of this nation's reciprocal trade agreement program and the tariff laws which the reciprocal trade agreements affect and modify. The court below has reaffirmed and adopted a policy for determining the meaning to be given to any ambiguous word used in any of the many trade agreements to which the United States is a party in a way to give effect only to the implied intent of the American side of the negotiation. If the aims,

---

[17]—The multilateral General Agreement on Tariffs and Trade was signed by the United States at Geneva (1947) and thereafter extended at Annecy (1949) and Torquay (1951) to cover commercial trade relations with Australia, Austria, Belgium, Brazil, Burma, Canada, Ceylon, Chile, Cuba, Czechoslovakia, Denmark, Dominican Republic, Finland, France, Germany, Greece, Haiti, India, Indonesia, Italy, Korea, Liberia, Nicaragua, New Zealand, Norway, Pakistan, Peru, Union of South Africa, Southern Rhodesia, Sweden, Turkey, Uruguay and United Kingdom.

[18]—Copeland v. United States, 12 Cust. Ct. 85, C.D. 833; Fenton v. United States, 15 Cust. Ct. 200, C.D. 972; in Crosse & Blackwell v. United States, 18 Cust. Ct. 123, C.D. 1055, affirmed in Crosse & Blackwell v. United States, 36 C.C.P.A. (Customs) 33, C.A.D. 393; Landweer v. United States, 23 Cust. Ct. 171, Ab. 53576.

objectives, purposes and intent of a foreign government and its negotiators are not also to be similarly considered in determining the meaning to be given to such words contained in a reciprocal trade agreement and the goods of the foreign government are thereby subjected to higher customs duties than it believed would be applied under the agreement, then chaos and confusion in the international trade of this nation will ensue, our commercial relations with foreign countries will be adversely affected, and the congressional and executive national policies of encouraging trade and commerce with foreign nations will be defeated and frustrated. Moreover, foreign governments, in retaliation, can be expected to pursue a similar policy to the injury of our export trade.

The rule of trade agreement construction established and applied to the importers in this case will affect hundreds of other importers, thousands of other commodities and articles of commerce not here involved. The court below has announced and reaffirmed a rule applicable not merely to the Mexican trade agreement and in respect to the article of commerce here involved, but an unfortunate rule of construction which is applicable to all other trade agreements which have been, and are being, made.

(4) The decision of the lower court is believed to be contrary to, and in conflict with, the law as settled, and repeatedly reaffirmed, since the earliest days of this Court when construing words contained in revenue statutes. This rule was set forth succinctly in the case of *Arthur* v. *Cumming,* 91 U. S. 362—

> "The rule to be followed in the construction of revenue statutes in cases like this *is well settled in this court* (italics added). It is, that the descriptive terms applied to articles of commerce shall be understood according to the acceptation given to them by commercial men in our own ports at the time of the passage of the Act in which they are found."

See also *Two Hundred Chests of Tea,* 9 Wheat. 430; *Curtis* v. *Martin,* 3 How. 105; *112 Casks of Sugar,* 8 Peters 277; *Swan* v. *Arthur,* 103 U. S. 597; *Pickhard* v. *Merritt,* 132 U. S. 252; *American Net & Twine Co.* v. *Worthington,* 141 U. S. 468.

This commercial meaning should be given preference over the common meaning—(*Arthur* v. *Morrison,* 96 U. S. 108; *Newman v. Arthur,* 109 U. S. 132). It applies to new articles introduced into commerce after the revenue Act was passed (*Pickhard* v. *Merritt, supra*); and it "must be definite, uniform and general, and not partial, local or personal"—*Maddock* v. *Magone,* 152 U. S. 368; *Berbecker* v. *Robertson,* 152 U. S. 373.

The lower court in this case has declined to follow this "well-settled" rule applicable to the construction of revenue laws, and has created a new arbitrary set of rules of interpretation, not heretofore approved by this Court, to be applied when interpreting new words found in reciprocal trade agreements. This new rule disregards the meaning as commonly understood "by commercial men in our own ports", and looks primarily to extracts "drawn from" data supplied to the American negotiators of a trade agreement, but not to the negotiators of the foreign government.

Moreover, this new rule for interpreting words in a trade agreement seems to be in direct conflict with the position taken by this Court that a liberal construction should be given to words found in treaties and trade agreements—*Nielsen* v. *Johnson,* 279 U. S. 47; *Jordan* v. *Tashiro,* 278 U. S. 123; and *B. Altman* v. *United States, supra.* In fact this Court has held that compacts between nations should be more liberally construed than private agreements—*Choctaw Nation of Indians* v. *United States,* 318 U. S. 423, 431.

It is rare indeed that two recognized dictionaries or lexicographical authorities prepared by persons experi-

enced in the meanings to be given to words, will use the same phraseology to describe the same word; nevertheless, there is a uniform, definite common meaning for this word. Similarly, trade witnesses who are practical business men who seldom pretend to be scholars of the English language, cannot be expected to use the same phraseology to describe a well-understood definite, uniform expression commonly used in their trade. A commercial man can readily determine the trade nomenclature of an article of his trade when he physically inspects such article, but it is usually difficult for him to give an accurate precise explanation of his reasons for so doing. The courts should recognize that a trade witness' individual understanding of such a commonly accepted trade term is necessarily tinged by the particular phase of the business with which he is familiar. The lower court fails to take these facts into account. The lower court fails to accept a well-understood commonly used trade term as having a "definite meaning" if it appears that different qualified trade witnesses having long experiences in the same trade, do not use the same expressions and qualifying phraseology to define the same word. This position is carried so far in this case by the lower court that, even though every single one of the qualified trade witnesses who bought and sold a *variety of lines* pertinent to the word "huaraches"[19] *uniformly, unanimously* and *unquestionably* agreed that specified items of footwear handed to them for personal inspection were covered by their understanding of the word "huaraches", the court still felt warranted in disregarding such unanimous testimony upon the ground that such unanimous agreement did not establish a "definite" meaning. The lower court has extended the meaning of the term "definite" ("*definite,* uniform and general, and not partial, local or personal") as used in the cases of *Maddock*

---

[19]—Witnesses Schmidli, Salem, and Sullivan do not meet these qualifications.

v. *Magone, supra,* and *Berbecker* v. *Robertson, supra,* to such absurd and unreasonable limits, as to make it almost impossible ever to establish a common commercial meaning, and makes impracticable the application of this Court's "well-settled" rule of construction to customs cases. The lower court has so distorted and restricted this "well-settled" rule that at least one member of that court has admitted that it is impossible to establish commercial designation in a contested case:

> "I think this court has gone too far in the way of restrictive rules applied to proof of commercial designation and I wish to state here that in some of those decisions which I think are the most offensive in this regard I participated and I was the author of one of them.
>
> We have come to a point where *it is almost impossible, if not entirely so,* (italics inserted) to make a case of commercial designation which will stand up in the customs courts if it is questioned by the opposing party."

(Judge Bland (deceased) dissenting, *United States* v. *Fung Chong Co.,* 34 C.C.P.A. (Customs) 40, 48, C.A.D. 342.)

Apparently this Court has never been asked or had the occasion to pass upon the rules of construction to be applied when interpreting words used in a trade agreement made under the Trade Agreements Act of 1934, as revised and extended. There is an urgent need for such action at this date and before the aforementioned arbitrary and unfair rules are more firmly imposed by the lower court upon the international trade of the United States and become firm fixtures of customs law.

The common and commercial meaning for the word "huaraches" was established at the trial of this case by the testimony of many qualified trade witnesses, and the trial court drew a fair and reasonable composite picture

of this meaning (R. 271). Your petitioners feel that this meaning should not be disregarded in favor of other inaccurate definitions which are not shown to be, and not even claimed to be, acceptable either to the trade or to the Bureau of Customs, Treasury Department[20], or even to the U. S. Tariff Commission itself which created the item[6].

The instant case is an apt and timely vehicle for consideration and decision by this Court of the important question of whether the Courts should (as your petitioners contend and as this Court has repeatedly held when construing words in revenue acts of Congress), or should not (as the court below has held and reaffirmed) apply a liberal commercially approved meaning in accord with the practical constructions of the Department of State to words contained in the many trade agreements recently negotiated and signed by this government.

(5) When the meaning of treaties is uncertain this Court has held that recourse may be had to the negotiations and diplomatic correspondence of the contracting parties and to their own practical construction of it—*Nielson* v. *Johnson, supra; Jordan* v. *Tashiro, supra; Choctaw Nation of Indians* v. *United States, supra.* The only available evidence in this respect indicates that the U. S. Department of State intended to lower the duty upon "practically all imports" of women's, misses' and children's woven leather shoes coming into the United States from Mexico, and not on only a segment thereof. See Department of State Bulletin, Vol. VII, No. 183-A, Publication 1861, page 1033, as

---

[20]—After considering the definition of "huaraches" as contained in the "Digests of Trade Data" the Commissioner of Customs ruled on July 21, 1943, that "a huarache has a closely woven toe portion and some of the leather thongs forming the toe portion are extended to form a loop to fit about the heel of the wearer to hold the huarache on the wearer's foot"—Exhibit 50, R. 262-263.

published on the day when the Mexican trade agreement was signed:

> "Huaraches make up *practically all imports* of women's, misses' and children's shoes coming from Mexico." (italics inserted).

The court below applied this rule in such a way as to disregard and ignore the timely published intentions and practical constructions of the U. S. agency that conducted the trade agreement negotiations, and to adopt instead a subsequently issued definition by an agency that then had no official status as a negotiator. This in effect endows the Tariff Commission with treaty making powers at the expense of the State Department and creates executive and administrative confusion as between the various federal departments. Moreover, the holding and decision of the court below in this regard is believed to be erroneous and a misapplication of settled principles of treaty construction law enunciated by this Court in cases previously cited. It is important for this Court to resolve the administrative and executive conflicts in respect to treaty making powers created by the decision of the court below and to define authoritatively the proper scope and division of powers in such regard between the regular executive departments on the one hand and the United States Tariff Commission[3], an independent office or agency, on the other.

The settlement of the questions presented in this case as to what if any weight is to be given to timely statements made by the Department of State about the trade agreements it negotiates, is plainly in the public interest. It is important to have this principle of trade agreement construction settled authoritatively in the first instance and before greater loss has been suffered by importers and the nation's trade relations further disturbed and damaged.

(6) The orderly process of proceedings in an appellate court would seem to warrant court action only on facts

established of record or of common knowledge. The court below in this case has assumed facts that are not shown to exist and which are not of common knowledge, and has employed such assumed facts as a basis for reversing the judgment of the trial court. Your petitioners call upon an exercise of this Court's power of supervision.

The decision of the lower court is predicated upon the fact that the definition of "huaraches" contained in the "Digests of Trade Data" published by the United States Tariff Commission can properly be used in determining the meaning to be given to this word as contained in the Mexican trade agreement. This conclusion by the lower court is in turn based upon the *assumption* that such a definition was before the negotiators of both contracting parties at and prior to the negotiations leading up to the agreement (R. 286-287).

However:—

(a) The Mexican trade agreement was signed on December 23, 1942. The "Digests of Trade Data" were published on May 17, 1943, or five months after the agreement was signed (R. 306-307).

(b) There is no evidence before the court, factual or otherwise, to support a finding that the Mexican negotiators knew of the definitions contained in these "Digests" at or prior to the time when the Agreement was signed. All available facts show to the contrary.

(c) There is no evidence before the court, factual or otherwise, to support a finding that the United States negotiators were furnished with the same definitions as those contained in the "Digests".

(d) The Tariff Commission itself changed their definition of "huaraches" as found in these "Digests" and re-defined this term in 1948 by omitting all reference to their previous qualification that the heel of a "huarache" must be nailed on[6].

It is possible that over a period of five years a court never has need to change its statements or its rulings, but the refusal of the court below in the instant case to correct its statements and to refuse to reconsider a decision which it has assumed to base upon unestablished facts as pointed out clearly in the two Petitions for Rehearing, when coupled with the apparent consistent policy of that court during the course of the past five years to refuse to grant petitions for rehearing[10], seems to warrant a degree of beneficent supervision by this Court so as to insure that the fundamental judicial process for obtaining an impartial judgment based upon established facts, does not deteriorate into autocratic judicial chaos.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

ALLERTON DE CORMIS TOMPKINS
Attorney for Petitioners

December, 1951.

APPENDIX

Paragraph 1530(e), Tariff Act of June 17, 1930 (46 Stat. 667; 19 U.S.C. Sec. 1001):

"Par. 1530 * * *

* * * * * * * * *

(e) Boots, shoes, or other footwear (including athletic or sporting boots and shoes), made wholly or in chief value of leather, not specially provided for, 20 per centum *ad valorem;* * * *."

The pertinent portions of duty modifications as made under the "Trade Agreement between the United States of America and the United Mexican States" signed December 23, 1942 and proclaimed by the President to be effective as to merchandise imported on or after January 30, 1943—57 Stat. 833, 892—are as follows:

"Tariff Act of 1930 paragraph	Description of article	Rate of duty
1530 (e)	Boots, shoes, or other footwear (including athletic or sporting boots and shoes), made wholly or in chief value of leather, not specially provided for:	
	Huaraches	10% ad valorem
	Slippers (for housewear)	10% ad valorem

1530 (e)	Men's, youths', and boys' boots, shoes, or other footwear (including athletic or sporting boots and shoes), made wholly or in chief value of leather, not specially provided for (except turn or turned, or sewed or stitched by the process or method known as McKay, or made by the process or method known as welt)	10% ad valorem."

Appendix

"United States Tariff Commission

Trade Agreement Between the United States and Mexico. Digests of Trade Data with Respect to Products on which Concessions were Granted by the United States".

(Issued May 17, 1943) (Parenthesis inserted)

In the foreword it is stated:

"The introduction to this volume consists of an analysis of the trade agreement between the United States and the Mexican Republic, signed December 23, 1942; a statement concerning the economy of Mexico; and data relating to trade between the two countries.

Following the introduction are digests of information concerning products on which concessions were granted by the United States in the trade agreement with the Mexican Republic. The material presented has been drawn from the detailed data made available by the United States Tariff Commission, prior to and during the negotiations with Mexico, to the Trade Agreements Committee, which is the interdepartmental body charged with carrying out the trade-agreements program. Practically all of this information was gathered by the Tariff Commission in compliance with that part of Senate Resolution 334, 72d Congress, 2d Session, which called for a revision of summaries of tariff information previously compiled by the Commission."

The definition of "huaraches" appears on page 223 under the heading "Description and Uses," and is as follows:

"Huaraches are leather-soled sandals having woven-leather uppers laced to the insole. The insole is

machine-stitched to the outsole, and the heel is nailed on. They are used principally by women and girls for beach and casual summer wear."

IDENTIFICATION OF DECISIONS, FOOTNOTE 10, WHEREIN THE U. S. COURT OF CUSTOMS AND PATENT APPEALS HAS WITHIN THE PAST 5 YEARS DENIED PETITIONS FOR REHEARING:

Rehearing denied 5/3/46 — United States v. Wm. S. Pitcairn Corp., 33 C.C.P.A. (Customs) 183, C.A.D. 334, Suit 4513;

Rehearing denied 6/7/46 — United States v. Canada Dry Ginger Ale, Inc., 34 C.C.P.A. (Customs) 12, C.A.D. 337, Suit 4530;

Rehearing denied 9/30/46 — United States v. Fung Chong Co., 34 C.C.P.A. (Customs) 40, C.A.D. 342, Suit 4524;

Rehearing denied 2/27/47 — Marshall Field & Co. v. United States, 34 C.C.P.A. (Customs) 141, C.A.D. 357, Suit 4550;

Rehearing denied 11/17/47 — Peat Products Corp. v. United States, 35 C.C.P.A. (Customs) 84, C.A.D. 375, Suit 4569;

Rehearing denied 2/10/48 — Roche-Organon v. United States, 35 C.C.P.A. (Customs) 99, C.A.D. 378, Suit 4578;

Rehearing denied 12/7/48 — United States v. H. S. Dorf & Co. of Pa., Inc., 36 C.C.P.A. (Customs) 29, C.A.D. 392, Suit 4590;

Rehearing denied 5/2/49 — United States v. Jovita Perez, 36 C.C.P.A. (Customs) 114, C.A.D. 407, Suit 4588;

Appendix

Rehearing denied 5/2/49 — Griffon Importing Co. v. United States, 36 C.C.P.A. (Customs) 121, C.A.D. 408, Suit 4603;

Rehearing denied 12/12/49 — Stan Newcomb & Barbara Todd v. United States, 37 C.C.P.A. (Customs) 18, C.A.D. 413, Suit 4617;

Rehearing denied 3/31/50 — United States v. Charles R. Allen, Inc., et al., 37 C.C.P.A. (Customs) 110, C.A.D. 428, Suit 4621;

Rehearing denied 3/31/50 — United States v. Paul Pankey & Co., 37 C.C.P.A. (Customs) 124, C.A.D. 429, Suit 4622;

Rehearing denied 6/13/50 — Geo. S. Bush & Co., Inc. v. United States, 38 C.C.P.A. (Customs) 30, C.A.D. 435, Suit 4627;

Rehearing denied 12/5/50 — C. S. Allen Corp. v. United States, 38 C.C.P.A. (Customs) 48, C.A.D. 438, Suit 4643;

Rehearing denied 2/2/51 — United States v. Union Olive Oil Co., Inc., 38 C.C.P.A. (Customs) 73, C.A.D. 442, Suit 4636;

Rehearing denied 6/26/51 — Balfour Guthrie & Co. v. United States, 39 C.C.P.A. (Customs) —, C.A.D. 457, Suit 4655;

Rehearing denied 9/28/51 — Vernon Distributing Co. v. United States, 39 C.C.P.A. (Customs) —, C.A.D. 463, Suit 4653;

Rehearing denied 9/28/51 — Weigert-Dagen, et al. v. United States, 39 C.C.P.A. (Customs) —, C.A.D. 464, Suit 4664;

Rehearing denied 11/5/51 — Weigert-Dagen, et al. v. United States, 39 C.C.P.A. (Customs) —, C.A.D. 464, Suit 4664.